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RUSSIAN PERSPECTIVES ON INTERNATIONAL LAW

Strasbourg's Effect on Russia – and Russia's Effect on Strasbourg

LAURI MÄLKSOO — 3 January, 2018



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It has been occasionally asked, in the light of case law that comes out from the European Court of Human Rights (ECtHR), whether Russia actually complies with the ECtHR's judgments. In terms of the big picture, even more important is the question whether the country has made any systemic progress in terms of human rights protection while being part of the Strasbourg system. How could the paradox be explained that while being part of the Strasbourg system, Russia seems to have actually backslided in terms of the protection of some key political rights? Perhaps being part of the liberal Strasbourg with its price tag for individual violations offers a useful camouflage when making illiberal systemic changes in politics?

Altogether, theories of socialization and acculturation via European human rights law have proven too optimistic in the case of post-Soviet Russia. Socialization can only happen – or not – in concrete historical and social circumstances. There are historical alternatives to liberal choices and outcomes; there is no 'end of history' in Europe. Positive socialization in the context of human rights is not a guarantee that will inevitably materialize. Moreover, socialization in the context of human

rights can take unexpected turns.

Yes, it is true that while being part of the Strasbourg system, Russia has undertaken several progressive structural reforms. For example, Russia reformed its criminal procedure law. In this sense, there certainly has been a certain Strasbourg effect on Russia. Moreover, there is a whole new generation of experts of European human rights law in Russia – lawyers like Anton Burkov, Kirill Koroteev, Grigory Vaipan and others – who, with their litigation and activism, have collectively started to have an impact on the dynamics within the legal profession in Russia. Having the Strasbourg court out there has motivated the younger Russian lawyers to diversify and successfully use legal mechanisms beyond Russian courts. The very existence of Strasbourg has changed the perception of the younger generation of lawyers on what is the role of law and lawyers in the Russian society.

However, part of the Strasbourg effect on the Russian government has also been *rejection* – i.e., a rejection of certain philosophical assumptions that have informed judgments of the European Court of Human Rights. One of the main protagonists here is the Russian Constitutional Court, especially its chairman Valery Zorkin. However, the Russian Ministry of Foreign Affairs has also occasionally expressed its political disagreement with certain judgments of the ECtHR. Disagreements emerged concerned the *Ilascu* and *Kononov* judgments and deepened with the *Markin* case. In the *Markin* case, the ECtHR and the Russian Constitutional Court clashed directly. In July 2015, the Constitutional Court decided that it had the right to check the constitutionality of the implementation of judgments of the ECtHR in Russia. Already in two cases – *Anchugov and Gladkov* and *Yukos* – it had concluded that the implementation of the judgments would contradict with the Constitution. The Russian State Duma has subsequently endorsed this approach introduced by the Constitutional Court. The Council of Europe has not yet found a satisfactory response to these developments.

According to Carl Schmitt, sovereign is he who decides about the state of exception, and with its 2015 judgment the Russian Constitutional Court has indicated that Russia remains a fully sovereign nation, even under the jurisdiction of the ECtHR. Of course, from the viewpoint of

the ECtHR, the approach taken by Russia in 2015 sets a quite dangerous precedent – especially if other Council of Europe member states would start to copy it. Yet in a certain sense, there is nothing completely unexpected or illogical here either. Russia has simply applied its usual 'great power logic' to the ECtHR. It has veto power in the UN SC so why not claim it regarding certain (perceived as hostile) judgments of the ECtHR?

In 1996, when Russia became a member of the Council of Europe and in 1998 when the country ratified the European Convention on Human Rights, it was naively/optimistically assumed in the West that the Strasbourg system would help to 'civilize' (liberalize) post-Communist Russia. By today, the Russian government has made it quite clear that it does not want to be 'civilized' (liberalized) in such a top-down way. Instead, Moscow and St Petersburg (the seat of the Russian Constitutional Court) have advocated traditional values in the context of human rights – not just in the Council of Europe but for example also in the UN Human Rights Council. Thus, membership in the Council of Europe has become so diverse that different member states of the organization are occasionally on different sides in important ideological debates in the global political human rights body, the Human Rights Council.

Therefore, we should pay further attention to Russia's impact at the Council of Europe and the European Court of Human Rights. Socialization has not been a one-way-street. To assume that Strasbourg could just 'civilize' countries of the size and history of Russia without significant impulses in the other direction would be too simplistic and frankly even arrogant in an unhelpful way.

Thanks to Russia and, in particular, to personalities such as the chairman of the Constitutional Court, Valery Zorkin, and the head of the Russian Orthodox Church, Patriarch Kirill, there is an accelerating ontological and epistemological debate about the philosophical foundations of (European) human rights law. These Russian conservative lawyers and theologians have persistently challenged liberal orthodoxies and prevailing dogmas regarding European human rights law and its making. Whether one agrees or disagrees with their positions substantively does not matter in the present context. What

matters is that there is significant intra-European debate on the nature and direction of human rights; something that did not exist so visibly in the 1990s.

In free societies, the philosophical foundations of human rights will always remain a legitimate concern and subject of discussions. It is well known that human rights are not just based on black letter law but inevitably also deeply connected to understandings of morality. It is also thanks to the Russian conservative lawyers and religious thinkers that we are having a more large-scale debate on *which* morality exactly that is or should be. As a consequence, human rights have become a more dialogical and dialectical matter within the Council of Europe. Issues such as state sovereignty, judicial activism, dynamic interpretation of the European Convention on Human Rights are of major interest for all Council of Europe member states. Russia's 'persistent objections' and conservative theoretical voices have contributed to lively, even passionate debates in which there are few taboos.

Looking back, it is well possible that the decision to accept post-Soviet Russia as member state of the Council of Europe in 1996 and to subject Russia to the jurisdiction of the European Court of Human Rights in 1998 was an example of (West) European 'imperial overreach'. But Russia is historically (also) a European country so it could not initially be denied a seat at the table for the sake of ideological purity and impeccable record of behavior – including when defining what human rights mean. Russia's membership in the Council of Europe is a good reminder that Europe taken together (not just Western Europe) is more diverse culturally, historically and nowadays again also ideologically than the liberal moment of the 1990s suggested. This is not how the founding fathers imagined the Council of Europe. The Convention and the Court have indeed been 'living instruments' to which the participation of Russia has injected some new, occasionally even unexpected life.

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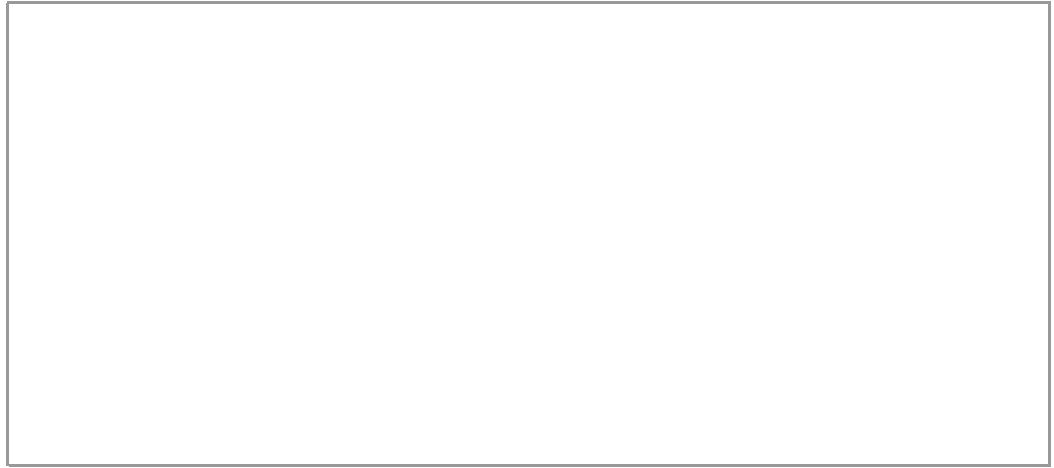
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